In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1340

ANTHONY ACARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York in February 1968, petitioner was convicted on two counts charging the illegal purchase and concealment of heroin on October 22, 1965 (21 U.S.C. 174; 26 U.S.C. 4704(a)). He was sentenced to concurrent ten-year prison terms. The court of appeals affirmed (Pet. App. A).

1. The evidence adduced at trial is not in dispute and is summarized in the opinion of the court of appeals. It showed in outline that following the receipt of information from informants and their own surveillance, four Federal narcotics agents—Messrs. Telb, Hughs, Bishop and Guy—arrested petitioner

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on the evening of October 22, 1965, on a narcotics charge. A search of his car at the time by agent Bishop revealed narcotics, which Bishop immediately showed to the other agents. All four agents testified in detail at trial, recounting the events leading to and culminating in the arrest.

In late March 1968, about a month after the jury verdict, defense counsel moved for a new trial on the ground that the government had withheld pertinent information from the defense. It was alleged that in November and December 1966, two indictments had been returned against federal agent Bishop by New York County charging that in late June or early July 1966—i.e., about nine months after he participated in petitioner's arrest and about four and one-half months after the February 15, 1966 indictment against petitioner had been returned—Bishop had attempted to sell or had sold a stolen automobile and had received monies from the sale of this automobile. It was alleged that, although these facts were known to the United States attorney at the time of trial, he failed to inform petitioner or his counsel thereof. At a preliminary hearing on this matter [1] on March 28, 1968, before Judge Mishler (the trial judge) defense counsel stated that he learned of the pending indictments from the defendant shortly after the verdict. Government counsel (Assistant United States Attor-

[1] Transcripts of this preliminary hearing, the further preliminary hearing of April 5, as well as the full dress evidentiary hearing on April 12, 1968, are on file with the Clerk of this Court. When referred to herein these separately paginated transcripts are referred to as "H" followed by appropriate page reference.

ney Grunewald) advised the court that the first time he heard about the indictments was when he talked to Mr. Bishop on the day the latter testified at trial, although he had earlier heard that Mr. Bishop had had some difficulty with the purchase of a "hot car" (H. 785). There was no information in his files concerning this matter (H. 785). After further preliminary discussion with counsel on April 5, the trial court scheduled a full evidentiary hearing on April 12.

At the hearing, the district court pointed out that its purpose was to afford defense counsel an opportunity to show the court how this information could have been used by the defense at trial (H. 34). At the outset of the hearing, Bishop's employment file was made available to the defense by the government. It showed that he had resigned from the narcotics bureau on July 29, 1966—about nine months after the commission by petitioner of the narcotics offenses for which he was convicted (H. 7–10). Petitioner testified at the hearing that he had first learned of the indictment a day or so after his conviction and had then told his lawyer (H. 60–93). Former agent Bishop stated that he had first spoken to government counsel on the morning of his trial testimony and had then told him of the indictment (H. 96–120). Government counsel explained to the court that he felt then and still believed "that the government was not obliged to make a disclosure of the fact that it had received information that a man had been indicted for the commission of an unrelated crime" (H. 137).

At the conclusion of the hearing, the district court found that the failure of the Assistant United States

Attorney to disclose to defense counsel the information concerning Bishop's pending indictment was a "good faith" value judgment based on his conclusion that the information was unrelated to the issue of Bishop's credibility. The court further held that such information was not admissible in evidence "under any conceivable theory" submitted by defense counsel at the hearing, that the evidence against defendant adduced at trial "was overwhelming," and that the "so-called impeaching material would not probably produce a different verdict if a new trial were granted" (H. 149–151). Accordingly, the court denied the motion for a new trial (H. 151). The court thereafter incorporated its findings in a memorandum opinion (Pet. App. A13–A19). This opinion reiterated the court's findings that the defense "has failed to demonstrate" how it could have properly used this "collateral" information at trial, that the failure of the government to disclose this information at trial was a "good faith" decision not violative of due process requirements, that the trial testimony of the "four agents was mutually corroborative and impressive" establishing "overwhelming" proof of guilt, and that in these circumstances even if this evidence had come before the jury "it would not have produced a different result."

The court of appeals correctly held that there was no basis for a new trial on this ground. As it pointed out, the government did not "build up" Bishop's credibility at trial by relying upon the fact

that he was employed in positions of trust during the period in which the indictment had been returned. Government counsel merely asked Bishop a few questions at the outset of his direct examination as to his employment record after he had left the Bureau of Narcotics. This could hardly have suggested to the jury that his testimony was entitled to special weight (See Pet. App. A8). The court below further properly found, as had the district court, that the Assistant United States Attorney was in no way guilty of "deliberate falsification" but had acted in the "good faith" belief that the evidence as to the indictments was totally inadmissible. Nor was there any showing—although the defense was afforded full opportunity to do so at the hearing conducted by Judge Mishler—that this information was "material either to guilt or to punishment" within the rationale of *Brady* v. *Maryland*, 373 U.S. 83, 87, or otherwise admissible. The most that could be said is that the government in good faith failed to produce material which had but the slightest possibility of affecting the trial. As both courts below held, this provides no basis for granting a motion for a new trial.

2. The other two contentions raised by petitioner—the existence of probable cause for his arrest, and the sufficiency of the trial court's instructions (to which no objection was made at trial) as to the meaning of reasonable doubt—are fully answered in the thorough opinion of the court of appeals, on which we rely (See Pet. App. A2–A7, A10–A12).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1969.